

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.501 of 2015

Arising Out of PS.Case No. -14 Year- 2014 Thana -MAJHAHGARH District- GOPALGANJ

- =====
1. Nanhaku Yadav @ Nanhku Yadav, Son of Bihari Chaudhary, Resident of Village- Bhaisae, P.S. Manjha, District- Gopalganj.
 2. Neepu Sah @ Nippu Shah, Son of Late Vishwanath Shah, Resident of Babu Visunpur, P.S.- Yadopur, District- Gopalganj.

.... Appellant/s

Versus

The State of Bihar

... Respondent/s

=====

Appearance:

For the Appellant/s : Mrs. Soni Srivastava, Adv.
Mr. amish Kumar, Adv.
Mr. P.K. Thakur, Adv.
Mr. Ravi Bhardwaj, Adv.
For the State : Smt. Abha Singh, APP

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT
Date: 27-04-2018

Appellant, Nanhaku Yadav @ Nanhku Yadav, Neepu Sah @ Nippu Shah vide judgment of conviction dated 22.07.2015 and order fo sentence dated 25.07.2015 passed by First Addl. Sessions Judge, Gopalganj in Sessions Trial No.100 of 2015 have been found guilty for an offence punishable under Section 6 of the POCSO Act and each one has been sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees ten thousand and in default thereof, to undergo S.I. for one year.

2. For an occurrence allegedly committed on 03.11.2013 a complaint petition was filed bearing Complaint Case No.3095/2013 on 19.11.2013 which was sent to the local police for registration and investigation of the case whereupon, case was registered on 16.01.2014 whereupon, investigation commenced and concluded by way of submission of charge sheet relating to an



allegation that on the alleged date i.e. on 03.11.2013 at about 10:00 AM while complainant/victim (name withheld, PW.4) aged about thirteen years had gone to old building of PHC, Majhagarh to bring back her she goat which was left for grazing by her mother, accused Nanhaku Yadav and Neepu Sah pounced upon her, untied her string and then committed rape upon her. On hue and cry, both two escaped and during course thereof, were seen by the witnesses.

3. During course of investigation their complicity was duly substantiated as a result of which they both were charge sheeted, proceeded with trial meeting with ultimate result, the subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither documentary nor oral evidence has been adduced in defence.

5. In order to substantiate its case the prosecution had examined altogether six PWs, PW.1-Neha Devi, PW.2-Dhurandhar Tiwary (father), PW.3-Chandrarekha Devi (mother), PW.4-Kajal Kumari, PW.5-Santosh Kumar (Investigating Officer), PW.6-Dr. Sarika. Side by side also exhibited Ext.1-Formal FIR, Ext.2-Injury report. As stated above, neither ocular nor documentary evidence has been led at the end of the defence.

6. Victim was examined by the PW.6 on 24.12.2014 that means to say more than a year after alleged occurrence and so, rightly been observed by her with regard to absence of any kind of evidence relating to commission of rape upon her. Though, she had



found the hymen absent.

7. Now coming to evidence of witness, it is evident that, they became unfavourable to the prosecution, right from PW.1 to PW.4. PW.1 disowned to have any sort of knowledge regarding the occurrence whereupon, she was declared hostile. Though, PW.2, PW.3 parents were also declared hostile as, they failed to name these two appellants to be the rapist although substantiated the occurrence whereupon were declared hostile. PW.4 in likewise manner supported the factum of rape but did not name these appellants on account thereof she was also declared hostile.

8. While convicting and sentencing the appellants, the learned lower court, as is evident from the judgment impugned put reliance upon Section 29 of the POCSO Act as well as the principle decided by the Hon'ble Apex Court in ***Bhagwan Das Vs. State of NCT of Delhi*** reported in **2011 (3) PLJR 241 (SC)** on the pretext that the statement whatever been made before the police in accordance with Section 161 of the Cr.P.C found to be admissible in the eye of law irrespective of status of the witness being during course of trial, hostile. In likewise manner, the learned lower court had also, by way of referring section 29 of the POCSO Act inferred that on account of presumption so allowed, it will be deemed to be against an accused and that being so, irrespective of status of the witnesses, the appellants have been convicted.

9. Both the grounds over which the learned lower court relied upon while recording the finding of guilt against the appellants are not at all applicable in the facts and circumstances of the



present case in the background of the fact that, in ***Bhagwan Das (supra)*** case the Apex Court was dealing with honour killing by the accused who happens to be the son of Smt. Bhillo Devi who killed his sister on account of continuing with incestuous relationship with her uncle and further, he had volunteered before his mother with regard to commission of murder of his sister whereupon, the Hon'ble Apex Court has considered it not only a statement recorded under Section 161 of the Cr.P.C. rather it was treated to be inculpatory extra judicial confessional statement of the co-accused and for reference, the relevant passage is quoted below:-

“In our opinion the statement of the accused to his mother Smt. Bhillo Devi is an extra judicial confession”

And then relied upon other relevant judicial pronouncement. So, it was not merely a statement under Section 161 of the Cr.P.C. rather it was soaked with an extra inculpatory judicial confessional statement having made by an accused before a public, admissible in the eye of law as happens to be out of purview of Section 24 of the Evidence Act.

10. In likewise manner, the presumption in terms of Section 29 of the POCSO Act would not be applicable in the facts and circumstances of the case because of the fact that none of the witnesses have had claimed identification of these two appellants in dock, which happens to be the substantial evidence. Because of the fact that, on account of aforesaid deficiency these two appellants have not been identified to be the culprit who committed rape upon the victim PW.4.



11. In the aforesaid facts and circumstances of the case, the judgment impugned would not survive. Consequent thereupon, same is set aside. Appeal is allowed. Appellants are on bail, hence are discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	30.04.2018
Transmission Date	30.04.2018

